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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Monday,
March 16, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

APPEARANCES:On Behalf of Broadcast Music, Inc.:

JOHN FELLAS, ESQ.
NORMAN C. KLEINBERG, ESQ.
MICHAEL E. SALZMAN, ESQ.
of: Hughes, Hubbard & Reed, LLP
One Battery Park Plaza
New York, New York 10004-1482
(212) 837-6075 (JF)
6680 (NCK)
6833 (MES)

and

JOSEPH J. DiMONA, ESQ. (Asst. V.P.)
MARVIN L. BERENSON, ESQ.
Legal and Regulatory Affairs
BMI
320 West 57th Street
New York, New York 10019-3790
(212) 830-3847

On Behalf of ASCAP:

I. FRED KOENIGSBERG, ESQ.
PHILIP H. SCHAEFFER, ESQ.
J. CHRISTOPHER SHORE, ESQ.
SAMUEL MOSENKIS, ESQ.
of: White & Case, LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8740 (PHS)
8394 (JCS)

BEVERLY A. WILLETT, ESQ.
ASCAP Building
Sixth Floor
One Lincoln Plaza
New York, New York 10023
(212) 621-6289

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APPEARANCES (continued):On Behalf of the Public Broadcasters:

R. BRUCE RICH, ESQ.

JONATHAN T. WEISS, ESQ.

MARK J. STEIN, ESQ.

TRACEY I. BATT, ESQ.

ELIZABETH FORMINARD, ESQ.

of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8170 (RBR)
8885 (JTW)
8969 (MJS)
8405 (TIB)

and

KATHLEEN COX, ESQ. (General Counsel)

ROBERT M. WINTERINGHAM, ESQ. (Staff Atty)

Corporation for Public Broadcasting

901 E Street, N.W.

Washington, D.C. 20004-2037

(202) 879-9701 (KC)

9707 (RMW)

and

On Behalf of the Public Broadcasters:

GREGORY FERENBACH, ESQ.,

(Vice Pres. & Acting General Counsel)

ANN W. ZEDD, ESQ. (Asst. Gen. Counsel)

KAREN C. RINDNER, ESQ. (Asst. Gen. Counsel)

PBS

1320 Braddock Place

Alexandria, Virginia 22314

(703) 739-5063 (GF)

5170 (AWZ)

and

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APPEARANCES (continued):

On Behalf of the Public Broadcasters:

NEAL A. JACKSON, ESQ.
DENISE B. LEARY, ESQ.
GREGORY A. LEWIS, ESQ.
Deputy General Counsel
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 414-2000 (NPR)
2049 (DBL)

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1 P-R-O-C-E-E-D-I-N-G-S

2 CHAIRPERSON GRIFFITH: All right. Let the
3 record reflect that we are now in executive session.

4 CROSS EXAMINATION (continued)

5 BY MR. RICH:

6 Q Could I ask you to turn once again to BMI
7 Exhibit 33, please, about which Mr. Kleinberg asked
8 you some questions?

9 Now am I correct in understanding this,
10 Mr. Willms? This exhibit purports to depict the
11 average minutes of music in non-commercial television
12 programming per hour between 1992 and 1996.

13 A That is correct in identified show hour.

14 Q Yes. I take it from your prior testimony
15 and to be clear, that this includes all music, of BMI,
16 ASCAP, SESAC, and public domain. Correct?

17 A That is correct.

18 Q Okay. And therefore, you testified that
19 it shows an increasing incidence of music use, looking
20 at the overall column over the five-year period.
21 Correct?

22 A That is correct.

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1 Q But it does not say anything, does it,
2 about whether and to what extent there has been an
3 increasing incidence of use solely of ASCAP and BMI
4 music. Correct?

5 A This particular schedule doesn't indicate
6 that.

7 Q Is there another schedule here that does
8 that I missed?

9 A Well, as far as what is in the exhibits,
10 I don't think you missed. We may have submitted some
11 underlying material that was requested that may have
12 that information.

13 Q To your knowledge, are either you or Dr.
14 Owen sponsoring any exhibit purporting to show between
15 1992 and 1996, or any other period, the change in
16 overall usage by public broadcasting of ASCAP and BMI
17 music combined to the exclusion of SESAC and public
18 domain?

19 A No.

20 Q I take it from your testimony as well that
21 the minutes here are not weighted for feature, theme,
22 or background uses. Correct?

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1 A No. They are not.

2 Q Straight durational.

3 A That's correct.

4 Q And that is the case, even though when BMI
5 distributes dollars to its public television and
6 commercial television composer and music publisher
7 affiliates, it does in fact engage in such weighting.
8 Correct?

9 A That is correct.

10 Q As Ms. Smith testified to earlier.
11 Correct?

12 A That is right.

13 Q Now do you agree with me that if you did
14 the straight math, that is to calculate the level of
15 increase shown in your overall, that is, between 21.94
16 average minutes and 24.81 average --

17 CHAIRPERSON GRIFFITH: 21.49, Mr. Rich.

18 MR. RICH: Pardon me. 21.94. Thank you.

19 CHAIRPERSON GRIFFITH: No. It's .49.

20 MR. KLEINBERG: I think we are in
21 different columns.

22 MR. RICH: I beg your pardon. At the

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1 bottom righthand of the column.

2 CHAIRPERSON GRIFFITH: Oh, the bottom
3 righthand. I'm sorry.

4 BY MR. RICH:

5 Q Thank you. Looking at 1992, 21.94
6 minutes. In 1996, 24.81 minutes. By my math, that is
7 something over a 13 percent increase. Does that sound
8 about right?

9 A That is correct.

10 Q And that is in total music minutes.
11 Correct?

12 A Yes.

13 Q As measured by BMI?

14 A Yes.

15 Q I take it that alone would not call for a
16 700 percent rate increase to BMI. Would it?

17 A That is only one of the factors that we're
18 speaking about.

19 Q But focusing on that factor, do you think
20 that by itself, isolating that factor would support a
21 700 percent increase?

22 A No. I think you have to look at the whole

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1 picture.

2 Q Do you think that would support, since
3 this is total minutes, do you think that would support
4 a 300 percent rate increase overall to ASCAP and BMI
5 combined?

6 A As I said, the reason we're asking for the
7 rate increase we are is bound up in a lot of reasons,
8 not just minutes of music.

9 Q But my question was --

10 A But it is one factor.

11 Q My question was focusing on this one
12 factor, if all else were static and this was the sole
13 changed circumstance among those you listed, would you
14 believe that a change, an increase in music minutes of
15 13 percent approximately, between 1992 and 1996 would
16 support an increase in overall music license fees
17 payable by public broadcasters to ASCAP and BMI
18 approximating 300 percent?

19 A Well if I could put it this way. If
20 public broadcasting fees bore a relationship to
21 commercial broadcasting fees and you were to ask the
22 question suppose in that case the minutes of music had

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1 gone up, then I don't think that that would then
2 warrant a further 300 percent increase if the fee rate
3 for public broadcasting was in the right proportion to
4 commercial broadcasting.

5 Q We'll come back and talk about that a bit.
6 Would you look at page 18 of your testimony, please?
7 Under the heading BMI music usage by commercial
8 television broadcasters, you site three items which
9 are claimed to support an approximation of the amount
10 of BMI music used by commercial television
11 broadcasters in recent times. Do you see that?

12 A Yes.

13 Q Would you focus on item three there,
14 please, which reflects -- which relates to an
15 examination of BMI's data containing BMI's regular
16 estimate of the total amount of music on non-
17 commercial television. Do you see that?

18 A Yes.

19 Q How does that data help you approximate
20 the amount of music used by commercial television
21 broadcasters in recent times? I am confused.

22 A I am not sure what you are driving at.

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1 Q If you look at the front of that
2 paragraph, as I read it, it says the amount, the top
3 of the paragraph says the amount of BMI music used by
4 commercial television broadcasters in recent times can
5 be approximated by one, two, and three. I am asking
6 you as to leg three of that, how does the amount of
7 music used by commercial broadcasters demonstrated by
8 BMI's data relating to the amount of music used by
9 non-commercial broadcasters?

10 A Well I think you have a point in if -- I
11 think as I read it, the idea is that we need to
12 compare the two. But literally if you -- I think I
13 take your point.

14 Q Meaning that it does not have a bearing on
15 that issue?

16 A That's right.

17 Q Okay. Now I want to walk you through my
18 rudimentary understanding of the methodology which BMI
19 and its expert Dr. Owen have employed in attempting a
20 music use comparison. Please tell me if I am correct
21 or partially correct or incorrect. Okay?

22 I take it that BMI supplied Dr. Owen with

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1 music data concerning non-network performances. That
2 is, performances by commercial, local television
3 stations occurring on the non-network part of their
4 day. Correct?

5 A Yes.

6 Q Covering the years 1991 and 1992?

7 A That's correct.

8 Q That's the Lexicon study?

9 A That's correct.

10 Q Now from this data, am I correct, Dr. Owen
11 drew certain conclusions as to music use overall and
12 use of BMI music on non-network television during
13 1992?

14 A That is correct.

15 Q Okay. Next, as I understand it, BMI
16 provided Dr. Owen with data concerning network music
17 use from which he drew certain conclusions as to music
18 use overall, and the use of BMI music on broadcast
19 television network programming during the years 1992
20 and 1995. Is that correct?

21 A Well, I think he drew conclusions as to
22 the amount of the millions of minutes of music in 1992

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1 and 1995.

2 Q On broadcast network television?

3 A That is correct.

4 Q So we have data as to the non-network
5 commercial television part of the day covering 1992.

6 A Yes.

7 Q Data as to the broadcast network portion
8 of the day for 1992 and for 1995, correct?

9 A That is right.

10 Q And I take it from your testimony that BMI
11 in its regular course of operations tracks music use
12 overall and BMI music use on public television pretty
13 much each year. Correct?

14 A Yes. Every quarter.

15 Q Now viewing this as a three-legged stool,
16 am I correct that the only year for which music use
17 data are available comprehending one, public
18 television, two, commercial local television, and
19 three, commercial network television is 1992?

20 A That is correct. We have not done a study
21 similar to the Lexicon study since 1992. So that is
22 the last one we had for local television.

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1 Q So am I correct then that the only
2 conclusions one can draw reasonably from BMI's music
3 use analysis reflect the state of relative music use
4 as between public television and commercial television
5 as of that one year, 1992?

6 A That is the one year that we have all
7 three pieces of information together.

8 Q So would you then agree with my statement
9 that that's the one year for which comparison can
10 properly be drawn?

11 A Well, I think that since we're looking at
12 the whole period and we do have public television data
13 for each one of those years, that we do have
14 information for part of the puzzle for all the years.

15 Q But you don't have it for all of the
16 puzzle for any year except 1992. Correct?

17 A I think that is probably true.

18 Q Is that all you can do, is think it's
19 probably true? You are the sponsoring witness over
20 all of this testimony. Are you not?

21 A Yes.

22 Q Is it not in fact true that the only year

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1 for which you have all the puzzle parts is 1992?

2 A Yes.

3 Q I believe you testified that the only
4 negotiations between public television and BMI with
5 which you are familiar surround the 1992 negotiations?
6 Is that correct?

7 A That is correct.

8 Q So that you have no knowledge of the
9 circumstances underlying the agreements reached in
10 1978 between BMI and public television?

11 A No specific knowledge.

12 Q I should say on public broadcasting. And
13 no specific knowledge as to the circumstances
14 surrounding the 1982 negotiations?

15 A That is correct.

16 Q And the same as to 1987?

17 A That is right.

18 Q And in 1992, I take it you were not at the
19 bargaining table physically. You were working
20 internally, as you put it?

21 A That is correct.

22 Q As part of senior management?

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1 A That is right.

2 Q Who were BMI's negotiators in 1992?

3 A Marvin Berenson was I believe the lead
4 negotiator.

5 Q A fellow named Sweeney also?

6 A He was with the company then.

7 Q Larry Sweeney?

8 A Yes.

9 Q And does the name Dan Gold mean anything
10 to you?

11 A Yes. I am not sure whether he
12 participated or not.

13 Q Do you know who participated for public
14 broadcasting in 1992?

15 A I don't know the names.

16 Q Are you aware that Paula Jameson
17 participated?

18 A That is possible.

19 Q Do you know how many meetings took place
20 between the parties in 1992?

21 A Not exactly, no.

22 Q Do you know over what time period the

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1 negotiations transpired?

2 A Several months.

3 Q Based on your recollection and debriefings
4 you had, did BMI come to the table and advise the
5 Public Broadcasters that BMI had been paid by some 700
6 percent in prior deals?

7 A (No response.)

8 MR. KLEINBERG: I'm sorry. Can I hear the
9 question again?

10 BY MR. RICH:

11 Q I may have mis-spoken, sorry, given the
12 hour. Is it your understanding, sir, that BMI came to
13 the bargaining table in 1992 and advised the Public
14 Broadcasters to the effect that BMI had been underpaid
15 in the prior license to the tune of about 700 percent?

16 A I don't believe they took that position.

17 Q Do you recall that they took a position
18 that they had been underpaid by as much as 100
19 percent?

20 A I can't really outline for you the
21 sequence of the negotiating steps that took place.

22 Q Do you have a recollection that BMI

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1 effectively sought anything other than a cost of
2 living increase for the prior term?

3 A I am not sure of that.

4 Q You knew it but don't recall?

5 A I may have known at the time.

6 Q Do you recall whether BMI's chief
7 negotiator, Mr. Berenson, acknowledged during the 1992
8 negotiations that it was appropriate to continue to
9 take consideration of the special nature of Public
10 Broadcasting in negotiating fees?

11 A I don't know that for sure.

12 Q Based on your recollection, did BMI
13 indicate in these negotiations that it was unable to
14 negotiate fair terms for BMI's affiliated composers
15 and music publishers on account of existing ASCAP rate
16 court litigation with the commercial television
17 broadcasters?

18 A I don't know if they articulated that
19 reason.

20 Q Do you recall whether BMI articulated that
21 some form of interim fee arrangement or reopener or
22 similar or most favored nation or something was

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1 required, awaiting the outcome of the as-yet non-final
2 local television rate court proceedings with ASCAP?

3 A I don't believe they did. Well, my
4 understanding of Most Favored Nation is that if you
5 have an arrangement with more than one licensee of the
6 same type, and you the agreement calls for there not
7 to be a fee greater than the other licensee, that kind
8 of most favored nation clauses sometimes requested by
9 the licensee you are negotiating with. In other
10 words, that they not receive a higher fee than their
11 similarly situated competitor.

12 Q Am I correct that at least one manner in
13 which Most Favored Nation clauses have been used in
14 your experience, whether at BMI or elsewhere, is to
15 protect an early signer of an agreement against being
16 competitively disadvantaged if a later similarly
17 situated entity were to get preferable terms?

18 A Yes. I have seen that situation in my
19 experience.

20 Q Is it not the fact that say in dealing
21 with ABC, CBS and NBC -- let me make the question more
22 generic. Is it not the case that in periodic dealings

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1 with licensees, BMI has been asked to or has offered
2 Most Favored Nation clauses in order to induce one or
3 more users to sign an agreement without undue concern
4 about how their competitors might do in subsequent
5 negotiations?

6 A Well I believe that they have been asked.
7 I am not sure that they have offered.

8 Q But you are familiar with that concept?

9 A Yes.

10 Q And as I have articulated it, it's
11 something that you have seen discussed in
12 negotiations?

13 A Yes.

14 Q Okay. Now I take it you do agree that at
15 the end of the day in the 1992 negotiations, BMI
16 agreed to terms predicated on the assumption that its
17 music use share, that is, its share of total public
18 television music use, hovered around 20 percent.
19 Correct?

20 A That is my understanding.

21 Q And I believe you testified, and pardon me
22 for not remembering, that you were in fact part of the

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1 senior management group responsible for approving the
2 1992 transaction with Public Broadcasting?

3 A Yes. I was a member of the senior
4 management group that was consulted about.

5 Q Did you ultimately give your approval?

6 A Yes. I did.

7 Q Did you, prior to giving your approval,
8 express the view to other senior managers or to BMI's
9 board that BMI should not enter this deal because it
10 represented an unreasonable subsidy of Public
11 Broadcasting?

12 A Well, I had objections as the chief
13 financial officer to the potential cost versus the
14 benefit of taking this to the CRT. So my involvement
15 was related to the fact that it was going to be very
16 expensive to challenge Public Broadcasting in this
17 particular case. So my approach to this was more
18 related to the fact that ASCAP had settled, and it was
19 going to be a very expensive proposition for BMI to go
20 to court for a questionable outcome.

21 Q Why did you regard it as a questionable
22 outcome?

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1 A Because I didn't know whether or not BMI
2 would prevail in a CRT.

3 Q Let me ask you this question. If as you
4 testified in direct examination by Mr. Kleinberg, BMI
5 feels the decimal point is in the right place, instead
6 of .4 it ought to be closer to four percent of
7 commercial, and if as it seeks in this case, BMI
8 claims it's being under paid by seven times, and wants
9 a 700 percent increase, by my math if you took the
10 \$785,000 that BMI agreed to for each year, for 1993 to
11 1997, and multiplied it by a factor of seven to ten
12 times that amount, namely the amount BMI here claims
13 it's really entitled to, times five years, wouldn't
14 that give you quite a healthy war chest before the
15 CRT?

16 A Well you have to remember, and I am sure
17 you do, that ASCAP had already settled.

18 Q But we earlier established that BMI makes
19 pricing decisions independently of ASCAP. Does it
20 not?

21 A Yes. But we're talking about comparing
22 music shares, which we also discussed. Based on the

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1 ASCAP settlement and our music share, it seemed
2 unlikely that a very very large increase which BMI
3 might feel entitled to could be sustained.

4 Q In relation to ASCAP per percentage point
5 of music use, BMI was held harmless as an outcome of
6 the 1992 negotiation. Isn't that true?

7 A (No response.)

8 MR. KLEINBERG: Object to the form of the
9 question.

10 BY MR. RICH:

11 Q Let me rephrase it. If you were to
12 analyze based on the roughly 20 percent music share
13 that the parties reached agreement on, what BMI
14 received from Public Broadcasters per percentage point
15 of music use, I take it you would agree with me that
16 relative to ASCAP, BMI was not disadvantaged during
17 the last license term. Correct?

18 A Relative to ASCAP, I think you could draw
19 that conclusion.

20 Q In fact, per percentage point of music,
21 each party received about \$38,000. Isn't that true?

22 A I haven't done the arithmetic.

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1 Q I think you would find it interesting if
2 you do. It comes out almost to the decimal point.

3 Did you have reason to believe that ASCAP
4 deliberately tanked the negotiations in 1992?

5 A No. I do not. I do not know. I know
6 virtually nothing about the ASCAP negotiations.

7 Q Now toward the end of your examination by
8 Mr. Kleinberg, you cited what I listed as four factors
9 in the nature of changed circumstance since 1992,
10 which you have claimed forms a basis for the level of
11 fee increase BMI seeks. Do you recall that testimony?

12 A Yes.

13 Q The first, according to my notes, was
14 changed music use. Yes?

15 A Yes.

16 Q So I'll ask you again by way of wrap-up
17 here, looking at that factor would the level of
18 increase in BMI music use from roughly 32 percent of
19 all music to something like 38 percent of all music,
20 if I recall your chart --

21 A If you could let me interrupt you. I
22 think the comparison is 20 to 38. I mean didn't you

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1 just say that the number was about 20 percent?

2 Q Let's just look at your testimony here.

3 Would you turn to page 22 of your testimony, please?

4 Yes. Do you see here you have proposed that the
5 increase in fact, based on your best now available
6 data, was from 32.3 to 38.6 percent. Yes?

7 A That is correct.

8 Q But even assuming it's from 20 percent.

9 A (No response.)

10 CHAIRPERSON GRIFFITH: Have you finished
11 your answer?

12 THE WITNESS: I was going to say but, but

13 --

14 MR. RICH: I think I'm taking you where
15 you want to go, if I may.

16 BY MR. RICH:

17 Q Even assuming the increase working 20
18 percent to 38.6 percent?

19 A Yes.

20 Q How would that support a 700 percent rate
21 increase?

22 A Well that is only one of the factors that

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1 we are talking about here.

2 Q A second factor I take it is that the
3 nature of public television has changed?

4 A Yes.

5 Q And is it your testimony that public
6 television has no dramatically changed in the last
7 five years, that is, since the last license fee was
8 negotiated, to warrant the 700 percent rate increase?

9 A Well, the facts are that my understanding
10 of the compulsory license is that PBS is not to be
11 subsidized. We have looked at this rate proceeding as
12 a case in which we need to have a comparison
13 benchmarked to compare against. The benchmark we have
14 chosen is commercial television and radio.

15 If you make that kind of comparison, then
16 we have arrived at a rate that we think is fair. Now
17 that rate happens to be a lot higher than the prior
18 rate. But it's based on an attempt to do an apples-
19 to-apples comparison. That is what we are trying to
20 present here. The fact that it is a big increase, all
21 that means is that the subsidy is being removed in our
22 request. We are squeezing out the subsidy so that we

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1 are on a fair basis.

2 Q Had you done the apples-to-apples
3 comparison in 1992, what level of fee increase would
4 BMI have been then entitled to?

5 A Well I have not done that calculation.

6 Q Hundreds of percentiles?

7 A A large increase, yes.

8 Q BMI did not seek that then, did it?

9 A No. I think I have tried to explain why.

10 Q And the third item you indicated in terms
11 of changed circumstances in 1992 was the fact that
12 ASCAP had settled before you. I believe we discussed
13 that factor --

14 A Yes.

15 Q As you saw it, right?

16 And finally, was the unsettled prior
17 environment. That is, as to ASCAP's relationships
18 with other users. Right?

19 A Yes.

20 Q We have established that that environment
21 was not unsettled as to commercial radio. Correct?

22 A That is correct.

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1 Q And it was not unsettled as to network
2 television. Correct?

3 A Well, we thought it was unsettled as to
4 network television.

5 Q Based on?

6 A Based on the fact that we felt the
7 agreements were interim.

8 Q What magnitude of change did you envision,
9 worst case, might come out of for example the ABC, CBS
10 rate court litigation covering the three-year period
11 1991 to 1993?

12 A Well we didn't know what that was going to
13 end that.

14 Q Do you have any knowledge of what the
15 respective positions of the parties were in that case?

16 A None. I don't think I could recall them.

17 Q Are you aware whether there was a
18 difference in a range of more than a million or two a
19 year for each of those three years between the
20 parties?

21 A I am not sure.

22 Q Looking at local television, what

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1 magnitude of decrease do you understand the local
2 stations were seeking in the Buffalo Broadcasting rate
3 proceeding?

4 A Well, a huge decrease. As much as 75
5 percent.

6 Q Seventy five percent decrease? From what
7 fees?

8 A From the level of fees that I believe
9 ASCAP was asking for.

10 Q What is the basis for that statement?

11 A Just my recollection of the information
12 that was provided I think by the TV Music License
13 Committee to its constituents.

14 Q Did you review any of the filings in that
15 case?

16 A In preparation for this case, no.

17 Q Now we have established I believe that BMI
18 has a fiduciary obligation to its affiliated composers
19 and publishers. Correct?

20 A That is correct.

21 Q And that includes securing a fair and
22 reasonable compensation on their behalf. Is that

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1 right?

2 A Yes.

3 Q You didn't believe you were derelict in
4 discharging that responsibility in 1992 when you
5 approved the Public Broadcasting BMI license
6 agreement, did you?

7 A We didn't think that we could -- that the
8 money it would cost to try to increase the fees would
9 sufficiently benefit the writers and publishers to
10 spend the money.

11 Q If I understand your testimony earlier,
12 you didn't necessarily believe that you could
13 materially improve upon those negotiated terms if you
14 went to the CRT. Is that correct?

15 A Given the circumstances, we didn't think
16 we could economically come out on making that,
17 spending that money.

18 Q Finally, I would like to turn your
19 attention to footnote 21 on page 26 of your testimony.
20 You there make reference to certain rate proposals
21 with certain other entities.

22 A Yes.

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1 Q Do you see that?

2 A Yes. Yes, I do.

3 MR. RICH: I seem to have forgotten the
4 document I intended to show the witness, Your Honors,
5 which is a -- I only have one copy, which is a
6 document style joint proposal of Broadcast Music Inc.,
7 the National Religious Broadcasters Music License
8 Committee, and the National Federation of Community
9 Broadcasters.

10 With leave of the Panel, I would like to
11 ask the witness if he can identify this proposal as
12 the one he is referring to. Then we will supply
13 additional copies.

14 CHAIRPERSON GRIFFITH: All right.

15 MR. KLEINBERG: Let me just note that this
16 document is the subject of the pending motion that is
17 being briefed about the relevance and admissibility of
18 this document.

19 I don't object, subject to that motion to
20 identifying the document solely for purposes of
21 identification. I do object for the reasons I stated
22 last week, to examination on the document until the

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1 Panel rules on the question which --

2 JUDGE GULIN: This has already been
3 identified, hasn't it?

4 MR. RICH: No, this is the BMI.

5 MR. KLEINBERG: It's the same type, and is
6 what I alluded to when I stood up and suggested that
7 I might be dealing with the same issue. I was told
8 that I probably wouldn't. So --

9 BY MR. RICH:

10 Q I have no substantive questions except to
11 ask the witness if this document is in fact the
12 document he is referring to in the first portion of
13 footnote 21 in his testimony.

14 A Well, I am afraid I can't give a positive
15 answer to that.

16 Q Why not?

17 A Because I haven't actually read this
18 document.

19 Q You felt it relevant to bring this matter
20 to the Panel's attention. Did you not?

21 A Yes.

22 Q That is why it's in your testimony.

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1 A Yes.

2 Q Now in the last sentence, there is a
3 reference to BMI proposing to continue the rate for
4 college and university radio stations unaffiliated
5 with NPR subject to annual cost of living increase.
6 Do you see that?

7 A Yes. I do.

8 Q Do you know if there is a piece of paper
9 reflecting that proposal?

10 A Actually I am sorry to say I don't.

11 MR. RICH: Okay. Thank you. I believe
12 that is the end of my questioning. I just want to
13 check with my colleagues.

14 CHAIRPERSON GRIFFITH: Does this need to
15 be marked?

16 MR. RICH: I think this should be marked
17 for identification.

18 MR. KLEINBERG: For identification.

19 MR. RICH: As 17X, I believe.

20 CHAIRPERSON GRIFFITH: It will be 17X.

21 (Whereupon, the document was
22 marked for identification as

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Exhibit No. 17X.)

MR. RICH: I have no further questions.

CHAIRPERSON GRIFFITH: All right. Mr. Schaeffer, do you have any cross examination?

MR. SCHAEFFER: I have some. I don't know if you wanted to do -- we're sort of out of order. I think they go next.

CHAIRPERSON GRIFFITH: I think you go next.

CROSS EXAMINATION

BY MR. SCHAEFFER:

Q I wanted to address a little bit about this bargaining that's been discussed between the commercial broadcasters and BMI. So let's just address first of all the radio broadcasters. You described negotiations which take place between the radio broadcasters and BMI, who wanted to get a radio license.

Now there is something called the Radio Music License Committee?

A That is correct.

Q Did it have a predecessor known as the All

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1 Music Radio License Committee?

2 A I have known it by the Radio Music License
3 Committee.

4 Q Now who do you understand the Radio Music
5 License Committee represents?

6 A My understanding is that they directly
7 represent a substantial number of radio stations and
8 the way it's been happening, whenever an agreement is
9 reached with the Radio Music License Committee, it's
10 proffered to the remaining stations and the practice
11 has been on their part to in the main accept the
12 agreement negotiated by the Radio Music License
13 Committee.

14 Q So that would it be fair to say that
15 people who are directly represented by the RMLC number
16 in the thousands of stations?

17 A Yes.

18 Q And would it also be fair to say that
19 there's kind of an understanding in the negotiations
20 that although there's only a few thousand of the
21 11,000 stations represented by the RMLC, BMI believes
22 in effect they represent the whole industry?

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1 A That is probably fair to say.

2 Q Now these are all of your radio customers,
3 aren't they, virtually?

4 A Well I think as we point out, there is
5 another committee that represents a smaller, a much
6 smaller number of radio broadcasters.

7 Q Less than 500, isn't it?

8 A Well --

9 Q Are you talking about the National
10 Religious Broadcasters?

11 A That is correct.

12 Q If I were to refer to you the opinion
13 that's already in evidence in this case as an ASCAP
14 exhibit, at the time that the last five-year tranche
15 of negotiations, which I think were up in 1997, they
16 represented about 700 stations maximum.

17 A That sounds like the correct number.

18 Q So but for the 700 stations, the RMLC
19 represents almost 11,000 radio stations with one
20 voice. Is that correct?

21 A I guess you could say it that way.

22 Q If that one voice walked away from the

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1 bargaining table, you would have no customer for your
2 music on radio. Would you?

3 A Well, we would have a difficult time
4 reaching agreement by having to go to each one of the
5 radio stations, yes.

6 Q And in fact, as a practical matter, you
7 would have the devil of a time getting your license
8 fees, wouldn't you?

9 A Yes.

10 Q Now with respect to the -- do you think
11 the Radio Music License Committee, is it your
12 understanding, is unaware of their bargaining power
13 with you?

14 A No.

15 Q Have you been at any of those
16 negotiations?

17 A Yes. I have.

18 Q Have they said to you, you know, we
19 represent the whole industry. You better deal with
20 us. Or words to that effect?

21 A Well, I think they have been forthcoming
22 in response to our questions as to how many they do

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1 represent. We believe that they are the focal point
2 for negotiations in the radio industry.

3 Q Now let's talk about the local television
4 committee. Is there a local television committee?

5 A Yes.

6 Q Analogous to the RMLC?

7 A (No response.)

8 Q How many stations do they usually
9 represent?

10 A Well, I think they represent virtually the
11 whole local television industry.

12 Q So when you sit down on the table against
13 the local television stations, they say we are your
14 only local television customer, as far as you are
15 concerned?

16 A We certainly believe again, that they are
17 the focal point for negotiations. They are the body
18 we negotiate with.

19 Q Have they ever indicated to you they were
20 intimidated by your market power in the television
21 industry?

22 A (No response.)

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1 MR. RICH: Can we get a time, a temporal -
2 -

3 MR. SCHAEFFER: Yes. The last two
4 bargainings, the last 10 years. Thanks, Mr. Rich.

5 BY MR. SCHAEFFER:

6 Q In the last 10 years, any of your
7 negotiations. Have they ever indicated they were
8 intimidated by you or afraid of you?

9 A Having been in the negotiations, I don't
10 think that they have indicated they were intimidated
11 by BMI in the least.

12 Q Do you have any idea of how big, what the
13 gross volume, the revenue per year of the local
14 television industry was in 1996?

15 A The gross revenues?

16 Q Yes.

17 A For television, it's in the \$30 billion
18 range, \$25 to \$30 billion.

19 Q Approximately what was the gross revenue
20 of BMI in that year?

21 A In 1996?

22 Q Yes. Approximately.

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1 A Oh, \$400 million.

2 Q And the radio business, the 10,000 or
3 11,000 stations in the United States, approximately
4 what was their gross revenue for say 1996?

5 A Eight to 11 billion.

6 Q Now you also negotiated I think you said
7 with the cable industry. Is that correct?

8 A That is correct.

9 Q Is there a committee that represents the
10 cable operators? Is there a similar bargaining
11 committee?

12 A Are you talking about operators or program
13 providers?

14 Q Are the cable TV licensees, and I don't
15 know much about this subject, the people who put on
16 the cable, are they represented by a committee?

17 A The operators are represented by a
18 committee, but we negotiate individually with the
19 cable program providers.

20 Q I'm not talking about cable program
21 providers.

22 A Like HBO and Show Time and so on.

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1 Q I am talking about yes, HBO and Show Time.

2 A We negotiate individually with each cable
3 source.

4 Q And is there such a thing as a cable
5 station or the equivalent of a broadcaster for
6 cable?

7 A Well there are cable operators.

8 Q Okay. How many cable operators are there?

9 A Hundreds.

10 Q And do you negotiate rates with them?

11 A We negotiate with a committee.

12 Q And what is the name of that committee?

13 A I think it's -- we refer to it as the NCTA
14 Committee, National Cable Television.

15 Q Do you have any idea of what their
16 revenues were in 1996?

17 A No. Not off the top of my head.

18 Q Have you made a settlement with the cable
19 operators?

20 A (No response.)

21 MR. KLEINBERG: I am going to object to
22 this line of questioning.

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1 BY MR. SCHAEFFER:

2 Q You have negotiated with the networks,
3 have you not?

4 A The television broadcast networks, yes.

5 Q In any of your negotiations with the
6 television networks, have they ever suggested to you
7 that the enormous market power of BMI has been quaking
8 so they'll give in supinely to what BMI told them to
9 do?

10 A I don't believe the negotiations could be
11 characterized that way, no.

12 Q How would you characterize them?

13 A I think their parties approach in the
14 negotiations with the eye to reaching a settlement.

15 Q And is it practical from the point of view
16 of BMI to say to any of these networks or negotiating
17 committees, we're not going to give you a music. Is
18 that a practical solution?

19 A I don't think we approach our negotiations
20 that way.

21 Q Is it practical to think you could do
22 that?

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1 A I hadn't thought about it. But I suppose
2 that's not the right way to do business.

3 Q By the way, with connection with the
4 public television and public radio licenses, were you
5 ever aware of what the rate was that was being paid to
6 ASCAP for this proceeding?

7 A For the --

8 Q Licenses.

9 A For the rate that was established for the
10 last, the years 1993 through 1997?

11 Q Yes.

12 A Yes. I am aware of that rate.

13 Q No, no. Prior to this proceeding were you
14 ever aware?

15 A I think I was made aware at the time of
16 the negotiations.

17 Q Were you ever -- when for the first time
18 did you ever see an ASCAP license of PBS and NPR?
19 Have you ever seen it?

20 A No. I haven't.

21 Q Did you ever see it any time in the last
22 10 years, any of the prior licenses?

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1 A No. I haven't.

2 Q Are you aware today that each and every
3 one of the licenses since 1982 provides that ASCAP and
4 the licensees, these are the public broadcaster
5 licenses, ASCAP and the public broadcaster licensees
6 agree that said license fee will have no precedential
7 value in any future negotiation proceeding before the
8 Copyright Royalty Tribunal, court proceeding, or other
9 proceeding between the parties. I'll show you what I
10 am reading from, it's the license itself.

11 Are you aware that that language was ever
12 in there?

13 A Yes. I think I have been told that that
14 language was.

15 Q When did you find that out?

16 A In preparation for this case.

17 Q Prior to preparation for this case, you
18 didn't know that?

19 A I probably didn't know that.

20 Q Now from time to time, are you aware of
21 the history of the local television licenses that
22 ultimately became the Buffalo Broadcasting case?

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1 A Would you repeat that question?

2 Q Okay. Isn't it a fact that ASCAP has an
3 experimental license in the 1950s with the television
4 industry?

5 A I was not aware of that.

6 Q From to time, does BMI license new media
7 on an experimental basis?

8 A Yes.

9 Q Would it be a secret to tell us what kind
10 of media have been licensed on an experimental basis?

11 A (No response.)

12 MR. SCHAEFFER: I look counsel for that.
13 Do you regard that as privileged?

14 MR. KLEINBERG: I look to my client for
15 that answer.

16 MR. DiMONA: In a generic sense, no. But
17 in a specific sense perhaps.

18 BY MR. SCHAEFFER:

19 Q Well, if you know. Things like the
20 Internet or new institutions. From time to time,
21 don't you have kind of an interim license?

22 A Yes. One example I can think of relates

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1 to cable television in its early days when I believe
2 BMI had what might be referred to as an experimental
3 license.

4 Q Experimental license. And generally
5 speaking, when you have an experimental license, the
6 rates aren't really treated as fixed in stone as they
7 would be when you have a more permanent relationship
8 as in radio and television. Is that true?

9 A That is the hope when you enter into an
10 experimental license.

11 Q And as part of your business from time to
12 time, don't you say all right, I may not maximize my
13 income from these particular users of my music, but
14 for a variety of business reasons, I'll let it go. It
15 won't be precedential. It will be experimental. Is
16 that correct?

17 A Yes.

18 Q Now to some extent, isn't that decision
19 governed by the fact that the nature of the media or
20 the people who are doing the communicating of the
21 music in the media and its performance are evolving
22 and changing? Isn't that one of the motivations?

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1 A Yes. It is.

2 Q But there does come a time, does there
3 not, when you learn that the particular institution
4 which is using your music is now either in a more
5 substantial position or has changed its position. Is
6 that correct?

7 A Yes. That is right.

8 Q At that time, you enter into more formal
9 or more permanent licenses, don't you?

10 A That is correct.

11 Q Now let me move to a different subject.
12 Exhibit 33 and 34, you will recall those?

13 A Yes.

14 Q I am trying to understand the analysis
15 just a little bit. That's an analysis by format,
16 isn't it? Or putting it another way, is there any
17 exhibit --

18 A (No response.)

19 MR. KLEINBERG: Excuse me, Mr. Schaeffer,
20 just for a second. I have forgotten whether we are on
21 or off the --

22 CHAIRPERSON GRIFFITH: We're still in

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1 executive session.

2 MR. KLEINBERG: I apologize for
3 interrupting.

4 BY MR. SCHAEFFER:

5 Q Let me go back to Exhibits 33 and 34, and
6 I will withdraw my prior question. Is there any
7 distinction in that chart or exhibit for the different
8 ways music is used?

9 A No. It's durational.

10 Q When you say it's durational, in other
11 words, I don't mean to be disrespectful, but what you
12 are saying in effect, it's music by the pound, isn't
13 it?

14 A Music by the minute.

15 Q It's music by a measurement. It doesn't
16 consider what the music is used for in the particular
17 program, does it?

18 A No. Other than it excludes commercials
19 and public announcements.

20 Q But it doesn't distinguish between themes.

21 A That is correct.

22 Q And it doesn't distinguish between

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1 background music, does it?

2 A That is correct.

3 Q And it doesn't distinguish between feature
4 music.

5 A That is correct.

6 Q And in fact though, in evidence I guess is
7 Exhibit 16X, which is the BMI payments that were made,
8 or the description of payments that are made to BMI
9 artists. Is that correct?

10 A BMI writers and publishers, yes.

11 Q Yes. Associates, I think you called them.

12 A Affiliates.

13 Q Affiliates, I'm sorry. Forgive me, I
14 don't know the nomenclature of ASCAP because I am new
15 to ASCAP so I sure don't know it for BMI. I
16 apologize.

17 Now in this distribution, you do
18 distinguish between feature, theme and background.

19 A That is correct.

20 Q Is that correct?

21 A That's correct.

22 Q Isn't that because the use as a feature in

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1 the music business may be thought of as more valuable
2 than music as background?

3 A That is correct.

4 Q One final question, only because I want to
5 clarify something, because I think it's unclear. You
6 have discussed the Buffalo Broadcasting case and the
7 fees which were paid to BMI and to ASCAP as an
8 outgrowth of that case. Remember?

9 A Yes.

10 Q You didn't suggest that the fees that were
11 paid by the television licensees were shared between
12 BMI and ASCAP?

13 A No. I certainly didn't.

14 Q In fact, there was hard bargaining by BMI
15 for its fee and there was hard bargaining by ASCAP for
16 its fee. One thing had nothing to do with the other
17 as far as the two PROs were concerned. Isn't that
18 correct?

19 A There was no relationship. There was no
20 shared bargaining. There were no shared fees.

21 Q And you were trying to get the best deal
22 you could for BMI, irrespective of what ASCAP?

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1 A That is correct.

2 MR. SCHAEFFER: No further questions.

3 CHAIRPERSON GRIFFITH: All right.

4 Redirect?

5 MR. KLEINBERG: I think I have just one
6 question for the witness.

7 REDIRECT

8 BY MR. KLEINBERG:

9 Q Mr. Willms, why has BMI chosen to utilize
10 the phrase measure by minute for the music use data
11 that you have submitted or the company has submitted
12 in support of this CARP?

13 A We think that this is the sort of purist
14 form of measurement. It is the most straight forward
15 way of measuring music share.

16 Q When you say it's the purist form, what do
17 you mean by that?

18 A One could weight music use in many
19 different ways. All those weighting formulas are
20 subjective. I mean even the rate schedule is
21 subjective. So I will say that we have looked at our
22 music share by feature, background and theme, and

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1 found it to be very similar to our music share using
2 the minutes of music approach. So we just think that
3 the minutes of music approach is a fairer way of
4 evaluating music share.

5 MR. KLEINBERG: Thank you, Mr. Willms. No
6 further questions.

7 CHAIRPERSON GRIFFITH: All right, any
8 other?

9 MR. RICH: Just one or two, Your Honor, if
10 I may.

11 CHAIRPERSON GRIFFITH: Very brief.

12 RECROSS

13 BY MR. RICH:

14 Q As of 1992, Mr. Willms, was BMI in an
15 experimental license relationship with Public
16 Broadcasting?

17 A Not that I know of.

18 Q ASCAP, to your knowledge?

19 A I know nothing about the ASCAP, that
20 relationship. But I don't think it was experimental.

21 MR. RICH: No further questions.

22 CHAIRPERSON GRIFFITH: All right. That

NEAL R. GROSS

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1 concludes the taking of testimony in evidence for
2 today. We stand adjourned until 9:30 tomorrow
3 morning.

4 Thank you.

5 (Whereupon, at 4:40 p.m., the proceedings
6 were adjourned, to reconvene the following morning.)
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CERTIFICATE

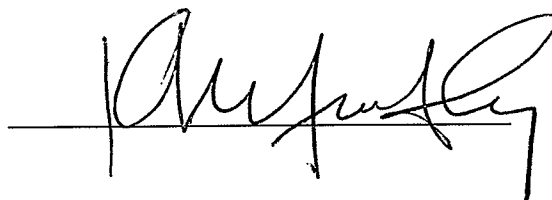
This is to certify that the foregoing transcript in
the matter of: Hearing: Adjustment of the Rates for
 Noncommercial Educational
 Broadcasting Compulsory License,
 Docket No. 96-6 CARP NCBRA

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: March 16, 1998

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

A handwritten signature in black ink, appearing to be "R. M. [unclear]", is written over a horizontal line.